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Vengeance and Mercy: Implications of Psychoanalytic Theory for the Retributive Theory of Punishment

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While it is perhaps a marriage damned, the union of law and social science has spawned numerous offspring. Empirical findings of fact from psychology, sociology, and psychiatry have served increasingly as the *ratio decidendi* in legal decisions of staggering import. The decisions to integrate public schools,[1] to restrict the use of certain forms of punishment,[2] and to revamp the classical definition of criminal insanity,[3] to mention but a few, have rested squarely on evidence received from the ostensibly non-legal realm of social science.

As the viability of using social science data to affect the legal system increases, the range of legal issues in which social science researchers are becoming involved is rapidly expanding. The attention of the researcher is shifting to examine not only case-specific questions of empirical fact, but also to examine the assumptions underlying both procedural and substantive matters

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1. The "separate but equal" justification for segregated public schools was struck down on the basis of empirical studies demonstrating that segregated schools instill a sense of inferiority in black children, which subsequently affects their motivation to learn. Brown v. Board of Educ., 347 U.S. 483, 487 (1954).
2. Isolating a juvenile for two weeks at a training school was held to violate the eighth amendment on the basis of testimony received from seven psychiatrists, psychologists, and educators. Lollis v. New York Dep't of Social Servs., 322 F. Supp. 473, 482 (S.D.N.Y. 1970), *modified*, 328 F. Supp. 1115 (S.D.N.Y. 1971).
3. Although overruled by United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), the holding in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), demonstrated the impact of social science testimony when it served as the initial challenge to the *M'Naghten* test of criminal insanity, *see* M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).

of law.[4]

This article extends the merger of law and social science to the areas of retribution and criminal punishment. More specifically, it examines the concept of retribution from historical, philosophical, and psychological points of view.[5] The goal is to develop an integrated concept of retribution, and to discern variables that psychological theory and research indicate are relevant to legal theories and practices in the area of retributive punishment.

I. THE HISTORICAL EVOLUTION OF RETRIBUTION

The "eye for an eye" notion of vengeance incorporated in the principle of *jus talionis* has been a central feature of societal thought for thousands of years. In primitive societies, crimes committed against an individual were avenged by either the victim or his clan.[6] Under this principle of the blood feud, members of a victim's clan were bound under a customary duty to exact from the offender (or a member of the offender's clan) a punishment equivalent to the injury suffered by the victim. Exactness in the form and degree of retribution was demanded. An early English case (*circa* 1115) relates: "a man who has killed another by falling on him from out of a tree is himself put to death in exactly the same method—a relation of the deceased solemnly mounting the tree, and . . . descending on the offender."[7]

The system of unrestricted blood feud eventually proved unsatisfactory. The most serious drawback was that no acceptable method was available to end the quarrel. An act of retaliation on the part of one clan would be cause for an act of retaliation on the part of the other clan. This was because no clan recognized that a wrong committed against another clan was itself a wrong, or that another clan had a right to avenge an injury. An initial injury, therefore, began a perpetual vendetta.[8]

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4. *See generally* L. FRIEDMAN & S. MACAULAY, LAW AND THE BEHAVIORAL SCIENCES (1969); B. SALES, PSYCHOLOGY IN THE LEGAL PROCESS (1977).
5. Just as six blind men can approach an elephant and develop entirely different concepts of what an elephant is (depending on what part of the elephant they contact), confining an analysis of retribution solely to the legal or penological viewpoint precludes other potentially valid (although also potentially restricted) perspectives. Retribution exists not only as a legal or penological concept, but also as a historical practice, a philosophical concept, and a psychological phenomenon. Through examining and integrating these various perspectives, one can more readily assess the strengths and weaknesses of each, draw conclusions as to the nature of retribution, and evaluate the assumptions underlying the legal perspective of retribution.
6. H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 399 (1943).
7. *Id.*
8. *Id.* at 401.

The development of systems of compensation and composition mitigated the self-perpetuating effects of the blood feud.[9] Under these systems, fines or monetary restitution could be sought in lieu of blood revenge. Early codes of many peoples, particularly the Anglo-Saxons, devoted much attention to a complicated system of regulations dealing with the determination of the *wergild*: the value of a man.[10]

Gradually the right of the victim to seek restitution or revenge from the offender gave way to the increasing claim of the state to the exclusive right to inflict retributory punishment.[11] If a victim was unable to demand the *wergild* due, or to pursue a proper blood feud, he or she could apply to the local lord for assistance. The offender soon had to pay additional sums of money, known as *manbot* and *wite*, to the victim and the king or lord respectively.[12] By the end of the twelfth century, however, the victim's right to monetary damages had vanished. Crimes were viewed as wrongs against the king's peace, not as wrongs against the victim, and all fines went to the royal treasury rather than to the victim or the victim's family.[13]

Similarly, during the twelfth and thirteenth centuries, the right of the victim to seek blood revenge lost ground to the power of the king.[14] It persisted somewhat in the form of the duel, but restrictions on this form of retribution effectively curbed its use. The principle of vengeance was retained, but transformed from private into public vengeance.[15]

Public vengeance generally took the form of corporal and capital punishment. Flogging, mutilation (ranging from amputation to tongue boring), branding, the use of stocks and the pillory, and chaining were common forms of corporal punishment.[16] Methods of capital punishment included flaying, impaling, beheading, hanging, firing squad, electrocution, and lethal gas.[17] Many of these forms of corporal and capital punishment survived relatively intact through the late nineteenth and early twentieth centuries.

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9. *Id.*
10. *Id.*
11. Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 223-25 (1965).
12. The *manbot* was paid as compensation for injuries less than death; the *wite* was a fine payable to the king or lord; the *wergild* was monetary compensation paid to a family group if a member of that family was killed or injured. F. WINES, PUNISHMENT AND REFORMATION 37-38 (1895).
13. Smith, *Mere People and Criminal Justice: A Proposal for Personal Responsibility*, 51 CAL. ST. BAR J. 388, 391 (1976).
14. *Id.*
15. H. BARNES & N. TEETERS, *supra* note 6, at 404.
16. *Id.* at 405-13.
17. *Id.* at 415-21.

During the mid-nineteenth century, however, consideration began to be given to the utility of punishment.[18] The notion of using punishment to rehabilitate and deter gained public support. Punishment began to be viewed not as a means of exacting retribution in accordance with the degree of harm done, but as a means to help the offender surmount the societal and personal obstacles which had led him or her to a life of crime.[19]

The focus in the twentieth century continued to shift from retribution and satisfaction of societal debt to treatment of individual offenders in order to restore them to societal usefulness. Forms of corporal punishment were struck down as violating the eighth amendment prohibition of cruel and unusual punishment;[20] prison sentences became indeterminate in order to assure that an offender was not incarcerated longer than necessary for rehabilitation.[21] Prison came to be viewed as an institution designed to provide rehabilitative experiences.[22] Punishment for the sake of exacting revenge or giving the offender his or her "just deserts" was seen as non-productive and wasteful.[23]

Within the last fifteen to twenty years a resurgence of interest in retributive forms of punishment has occurred. Proponents of retribution argue persuasively that the goals of rehabilitation and deterrence are not being achieved[24] and that indeterminate sentencing, developed in the interests of rehabilitation, creates more problems than it solves.[25] "Dehabilitation" rather than rehabilitation occurs, it is argued, when an offender is incarcerated for an indefinite period.[26]

A recent call for a return to the retributive theory of punishment is found in the recommendations of the Committee on the Study of Incarceration.[27] The Committee, established in response to prison uprisings of the early 1970s, stunned the correctional and

18. *See generally* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); J. WILSON, THINKING ABOUT CRIME (1975).
19. *See generally* authorities cited note 18 *supra*.
20. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968). *See also* Comment, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647 (1971).
21. *See* Lay, *A Judicial Mandate*, 7 TRIAL 14, 15-18 (1971).
22. *See generally* authorities cited in note 18 *supra*.
23. *See generally* authorities cited note 18 *supra*.
24. *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 18; T. SELLIN, CAPITAL PUNISHMENT 138 (1967); Chiricos & Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence*, 18 SOC. PROB. 200 (1970).
25. A. VON HIRSCH, DOING JUSTICE (1976).
26. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297 (1974).
27. A. VON HIRSCH, *supra* note 25, *passim*.

judicial communities in 1976 when one of its members, Andrew von Hirsch, published the Committee's recommendation to abandon indeterminate sentencing schemes, based on rehabilitation and deterrence, in favor of fixed sentencing, based primarily on retributive considerations.[28]

Under this fixed sentencing scheme, an offender is sentenced so that he or she receives the "just deserts" of his or her criminal act.[29] De-emphasizing rehabilitation, deterrence, and isolation, the Committee proposed two criteria for sentences: the harm characteristically associated with the offense, and the culpability of the offender.[30] Although a pure retributive model of punishment is diluted by allowing sentences to vary somewhat according to the individual offender's degree of culpability,[31] the overriding notion of equating punishment to the seriousness of the offense has brought the Committee's model to the forefront of the current retributivist resurgence.

II. THE PHILOSOPHICAL JUSTIFICATIONS OF RETRIBUTIVE THEORY

For examining questions of punishment, H.L.A. Hart has advanced a two-stage analytical framework.[32] At the most global level, the overall rationale or justification for inflicting punishment must be examined. Hart referred to this analysis as an investigation of the "General Aim" of punishment.[33] With respect to retributive theories of punishment, Hart stated that the General Aim of retribution is to return to the offender suffering for moral evil voluntarily done; he based this on the assumption that return of suffering is just, or morally good.[34]

Hart's second level of analysis concerns what he termed "Questions of Distribution."[35] Here attention is directed to the issues of who is to be punished, how severely, and in what manner.[36] To these issues Hart answered: "[A] person may be punished if, and only if, he has voluntarily done something morally wrong; . . . his punishment must in some way match, or be the equivalent of, the

28. *Id.*
29. *Id.*
30. *Id.* at 79-80.
31. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 798-802.
32. Hart, *Prolegomenon to the Principles of Punishment*, in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1 (1968).
33. *Id.* at 8-9.
34. *Id.* at 231.
35. *Id.* at 11-12.
36. *Id.*

wickedness of his offense . . . ."[37]

Although Hart's view of the issues involved in the distribution of retributive punishment (*i.e.*, who and how to punish) is valid, his justification (General Aim) of retribution is flawed. To justify punishment on the grounds that punishment is "just" or "morally good" is circular. In his examination of the differing theories of punishment, Honderich has noted:

> To attempt to argue that a man's punishment is justified, by saying in this sense that he deserves it, is obviously pointless. Any desert claim that reduces to the assertion that it is obligatory or permissible to impose a penalty cannot, of course, be offered as a reason for the proposition in dispute, that it is obligatory or permissible to impose the penalty. This is a simple fallacy where the supposed reason is identical with the supposed conclusion.[38]

Despite this error in his underlying logic, Hart's scheme of analysis has merit. Consequently, this discussion will adopt Hart's framework for assessing the philosophical bases of retribution.

A. The General Aim or Justification of Retribution

The General Aim of retribution theory differs significantly from other theories of punishment in its "backward-looking" focus. Other theories of punishment (*e.g.*, rehabilitation, deterrence, and isolation) punish offenders in pursuit of some future goal (*i.e.*, securing rehabilitation of the offender, deterring the offender and others from committing future offenses, and separation of the offender from society, respectively). In retribution, however, punishment is meted out solely because the offender has committed a crime; punishment does not serve as the means to an end, but is itself an end. Immanuel Kant, an oft-cited proponent of retribution, has stated:

> Juridical Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*. . . . The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment . . . .[39]

Punishment is justified in retributive thought because the offender, through committing a crime, has upset some form of societal balance. The offender has created an evil which must be

37. *Id.* at 231.

38. T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS (1969).

39. I. KANT, THE METAPHYSIC OF MORALS, in THE PHILOSOPHY OF LAW 195 (W. Hastie trans. 1887), *reprinted in* 42 GREAT BOOKS OF THE WESTERN WORLD 395 (1952) (emphasis in original).

requited[40] or annulled,[41] has obtained an advantage which other members of society have been denied,[42] has achieved a gain at the expense of another,[43] or has received a satisfaction at the expense of others.[44]

Retributive theorists differ as to where, or between whom, the imbalance develops following the commission of a crime. Aristotle would place the imbalance as existing between the perpetrator of the act (the criminal) and its recipient (the victim):

> [T]he law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it; for in the case also in which one has received and the other has inflicted a wound, or one has slain and the other been slain, the suffering and the action have been unequally distributed; but the judge tries to equalize by means of the penalty, taking away from the gain of the assailant.[45]

Herbert Morris, on the other hand, deemed the imbalance to lie not between the offender and the victim, but between the offender and the whole of society.[46] In Morris's view, society exists as a system wherein individuals comply with rules (bear a burden) in order to assure benefits for all. A crime occurs when an individual renounces his or her burden and thereby gains an advantage which the rule-abiding citizenry does not have. Meting out punishment to an individual who gains such an unfair advantage serves to "[assure] that [those who comply] will not be assuming burdens which others are unprepared to assume . . . [and] prevent[s] a maldistribution in the benefits and burdens."[47]

The view taken by Georg W.F. Hegel differs markedly from that of either Aristotle or Morris. Hegel viewed a criminal act not as creating an imbalance between an offender and another party (or parties), but as negating that which exists in universal consciousness as right. Right, being absolute, cannot be negated; it is therefore obligatory that the nullity created by the crime be annulled. Punishment annuls the negation of right. As Hegel stated, "The criminal act is not a primary, positive thing to which the punish-

40. E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108 (1964) (original publication 1893).
41. G. HEGEL, PHILOSOPHY OF RIGHT paras. 95-100 (1821), *reprinted in* 46 GREAT BOOKS OF THE WESTERN WORLD 9 (1952).
42. Morris, *Persons and Punishment*, in J. FEINBERG & H. GROSS, PHILOSOPHY OF LAW 572, 573 (1975).
43. ARISTOTLE, NICHOMACHEAN ETHICS, bk. V., ch. 4, at 1132, *reprinted in* 9 GREAT BOOKS OF THE WESTERN WORLD 333, 379 (1952).
44. T. HONDERICH, *supra* note 38, at 25.
45. ARISTOTLE, *supra* note 43, at 1132.
46. Morris, *supra* note 42, at 573.
47. *Id.*

ment would be added as a negation, but a negative, so that punishment is only a negation of negation."[48]

While Aristotle and Morris viewed punishment as a means of taking from the offender that which he or she has criminally gained, James F. Stephen[49] shifted the focus from the offender to the victim and ascribed to punishment the ability to give "satisfactions" to feelings of hatred possessed by the victim stemming from the offender's act. Stephen stated:

> It is not difficult to show that [crimes] have been forbidden and subjected to punishment not only because they are dangerous to society, and so ought to be prevented, but also for the sake of gratifying the feelings of hatred—call it revenge, resentment, or what you will—which the contemplation of such conduct excites in healthy minds. If this can be shown, it will follow that criminal law is in the nature of a persecution of the grosser forms of vice, and an emphatic assertion of the principle that the feelings of hatred and the desire for revenge above-mentioned are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner.[50]

The imbalance to be remedied under Stephen's analysis is not that of the offender's gain, but that of the victim's emotional grievance.[51]

Regardless of one's perspective of the exact nature of the imbalance created by a criminal act, punishment is deemed capable of restoring equilibrium in all cases. According to Kant:

> Public Justice takes as its Principle and Standard . . . the Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more to the one side than to the other. It may be rendered by saying that the undeserved evil which anyone commits on another is to be regarded as perpetrated on himself. . . . This is the Right of Retaliation (*jus talionis*); and properly understood, it is the only Principle which in regulating a Public Court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict Justice.[52]

It is the duty of the state rather than the individual victim to seek retribution from the offender.[53] The victim of a crime is felt to be too subjectively and emotionally involved to exact a fitting punishment. Were the victim to exact punishment, such would be an act of vengeance rather than an act of punishment. Vengeance is itself seen as an evil, but the administration of punishment by an

48. G. HEGEL, *supra* note 41, para. 101. *See also* A. EWING, THE MORALITY OF PUNISHMENT 21-26 (1929).
49. J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1874).
50. *Id.* at 161-62.
51. *See also* A. EWING, *supra* note 48, at 65-73; T. HONDERICH, *supra* note 38, at 17-21.
52. I. KANT, *supra* note 39, at 196.
53. *See generally* G. HEGEL, *supra* note 41, para. 220.

impartial tribunal is said to further reparation of the societal imbalance:

> When the right against crime has the form of revenge, . . . it is only right implicit, not right in the form of right, i.e. no *act* of revenge is justified. Instead of the injured party, the injured *universal* now comes on the scene, and this has its proper actuality in the court of law. It takes over the pursuit and the avenging of crime, and this pursuit consequently ceases to be the subjective and contingent retribution of revenge and is transformed into the genuine reconciliation of right with itself, i.e. into punishment.[54]

B. Questions of Distribution in Retribution

Questions of distribution in retribution (who is to be punished, how severely, and in what manner) are highly problematic. Because punishment is administered in order to restore some form of societal balance, the amount of punishment to be inflicted generally is viewed as being mandatorily equivalent to the degree of injury caused by the crime. This requirement of injury/punishment equivalence is found in all traditional theories of retribution, even though variations exist as to what constitutes the injury. Accordingly, Aristotle would seek to equate the punishment with the "gain" accrued by the offender; Morris would seek to remove the "advantage" gained; Hegel would have the evil "annulled"; Kant would require repayment of "like with like"; Stephen would seek "satisfactions" sufficient to placate the victim's "grievance."[55]

Although balancing the punishment and the injury is conceptually simple, determining the specific nature of the punishment to be inflicted presents a more difficult issue. Kant argues forcefully for the principle of *jus talionis*, wherein the penalties are designed to provide "like with like."[56] Under *jus talionis*, one is to examine the nature of the offense and then render a punishment designed to bring upon the offender a loss of the same nature as that inflicted on the victim:

> Thus a pecuniary penalty on account of a verbal injury, may have no direct proportion to the injustice of slander; for one who is wealthy may be able to indulge himself in this offence for his own gratification. Yet the

54. *Id.* (emphasis in original). This fear of subjective acts of vengeance is shared by proponents of utilitarian theories of punishment:

> I doubt not but it will be objected that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends; and, on the other side, ill-nature, passion, and revenge will carry them too far in punishing others, and hence nothing but confusion and disorder will follow . . . .

J. LOCKE, CONCERNING CIVIL GOVERNMENT, ch. II, para. 13 (1690), *reprinted in* 35 GREAT BOOKS OF THE WESTERN WORLD 25, 28 (1952).

55. *See* text accompanying notes 40-52 *supra* (a discussion of the theoretical differences underlying the varying concepts of the nature of an injury).

56. I. KANT, *supra* note 39, at 197.

> attack committed on the honour of the party aggrieved may have its equivalent in the pain inflicted upon the pride of the aggressor, especially if he is condemned by the judgement of the Court, not only to retract and apologize, but to submit to some meaner ordeal, as kissing the hand of the injured person. In like manner, if a man of the highest rank has violently assaulted a person of the lower orders, he may be condemned not only to apologize but to undergo a solitary and painful imprisonment, whereby, in addition to the discomfort endured, the vanity of the offender would be painfully affected, and the very shame of his position would constitute an adequate Retaliation after the principle of "Like with Like."[57]

Modern day retributivists, however, are unable to apply *jus talionis* strictly. The eye-for-an-eye concept clearly is not palatable to the twentieth-century form of jurisprudence, which forbids needless infliction of suffering and bars even the least painful forms of corporal punishment.[58] The deliberate infliction of shame[59] or banishment[60] or the seizure of an offender's property[61] (forms of *lex talionis*[62]) are similarly forbidden.

Current forms of punishment are essentially limited to imprisonment and fines.[63] Such a restriction on the available forms of punishment has served, and continues to serve, as an obstacle to the retributivist's goal of inflicting a punishment equivalent to the criminal injury. Hegel reasoned that equality (between injury and punishment) needs to exist only implicitly, or in "value," rather than in identical form.[64] The task, therefore, is to determine the

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57. *Id.*
58. *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (barring use of the strap); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967) (relief granted against the use of such devices as the crank telephone and the teeter board). The continued existence of capital punishment, however, may be seen as an exception to the abolishment of the *lex talionis*.
59. *See generally* Furman v. Georgia, 408 U.S. 238, 272-73 (1972); Comment, *supra* note 20, at 656-61.
60. Afroyim v. Rusk, 387 U.S. 253 (1967).
61. *Cf.* Bearden v. Industrial Comm'n, 14 Ariz. App. 336, 483 P.2d 568 (1971) (right to workmen's compensation and accident benefits not suspended during imprisonment of claimant serving less than a life sentence, but confinement does not extend time within which to measure and protect rights). *See generally* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1079-1143 (1970) (overview of prisoner's loss of property rights, insurance, pension, and workmen's compensation benefits).
62. The term *jus talionis* refers to the abstract principle of exacting revenge in a "like for like" manner, while the term *lex talionis* is generally understood to refer to more specific enactments of rules allowing punishment in the "like for like" fashion. *See generally* BLACK'S LAW DICTIONARY 770, 822 (rev. 5th ed. 1979).
63. Statutory schemes of victim restitution in some jurisdictions extend the concept of "punishment" to include repayment of the victim's actual damages by the offender. *See* Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 10 ST. LOUIS U.L.J. 238 (1965); Wolfgang, *supra* note 11.
64. Hegel, stated:
> It is only in respect of that form that there is a plain inequality between theft and robbery on the one hand, and fines, imprisonment,

length of imprisonment necessary to equate the punishment with the injury suffered by the victim. Hegel felt the amount of punishment (*i.e.*, the length of the sentence) can be readily ascertained through reference to "ideas universally present to conscious psychological experience."[65] In practical terms, Hegel argued that penalties should be based on public sentiments as to the appropriate sentence length for the various criminal offenses.[66]

Having discerned that punishment under a retributive philosophy is to be meted out (distributed) to the offender in a quantity and form designed to approximate the harm or injury caused by the criminal act, the distributive question of who merits punishment deserves attention. While philosophers basically agree that punishment should extend only to those convicted of an offense, conceptual difficulties have emerged in examining who or what constitutes an "offender." More precisely, the issue is whether punishment should be extended to an individual solely in response to his or her forbidden act, or whether punishment should be contingent on the individual's having possessed intent to commit the act. Particularly troublesome to some analysts of the retributive view is the potential for punishing an individual convicted of breaking a rule (law) accidentally, or through the doctrine of "vicarious liability."[67] Professor Martin R. Gardner framed the issue clearly:

> If culpability is limited to intent to do the proscribed act, then it is difficult to maintain that punishment is deserved under statutes requiring only that the defendant violate some standard of care which a reasonable member of the community would not have violated. . . .
>
> . . . . If culpability means the existence of an affirmative state of mind with respect to the particular proscribed act or consequence, then punishment could not be justified under statutes where a sufficient condition for conviction is a finding that the proscribed act was committed. But if culpability is thought of more broadly as requiring only some sort of causal relationship between the accused and the act in question, then punishment under traditional "strict liability" statutes may be justified.[68]

> etc., on the other. In respect of their "value," however, i.e. in respect of their universal property of being injuries, they are comparable. Thus, as was said above, it is a matter for the Understanding to look for something approximately equal to their "value" in this sense.

G. HEGEL, *supra* note 41, para. 101.

65. *Id.*

66. Such surveys by social science researchers have found significant agreement among demographic groups as to the length of prison terms which should be given various offenders. Thomas, Cage & Foster, *Public Opinion of Criminal Law and Legal Sanctions: An Examination of Two Conceptual Models*, 67 J. CRIM. L. & CRIMINOLOGY 110 (1976).

67. *See* T. HONDERICH, *supra* note 38, at 2-3.

68. Gardner, *supra* note 31, at 793-94 (footnotes omitted).

An examination of the historical and philosophical sources of retributive theory, however, clearly discredits imposing retributive punishment on an individual who did not rationally choose to commit the forbidden act. Hegel observed:

> The injury [the penalty] which falls on the criminal is not merely *implicitly* just—as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right *established* within the criminal himself, i.e. in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being . . . .
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> . . . . Further, what is involved in the action of the criminal is not only the concept of crime, the rational aspect present in crime as such whether the individual wills it or not, the aspect which the state has to vindicate, but also the abstract rationality of the individual's *volition*. Since that is so, punishment is regarded as the criminal's right and hence by being punished he is honoured as a rational being.[69]

III. PSYCHOANALYTIC PERSPECTIVES OF VENGEANCE AND MERCY

A person's car is stolen, his home is vandalized, his child is assaulted: how does he respond? The answer initially is quite simple: he becomes angry. His anger may emanate in many directions. He may be angry at himself for leaving his keys in the car, at his wife for failing to lock the door, or at his child for being out alone. The bulk of the anger, however, will be directed toward the perceived cause of the problem: the offender. Had these events occurred in an earlier day, the course of action would be clear: find the offender and avenge the wrong.[70] Conditioned by centuries of legal socialization, however, the modern victim will call on outside agents (*i.e.*, the police, courts, and correctional system) to avenge the wrong.[71]

Defining a person's response to a wrongdoing in terms of anger and a desire for vengeance, however, fails to address the more central issue of why the individual becomes angry. In the examples above no clear injury has befallen the victim. He lost a car, the house was damaged, or the child was injured, but the victim has not personally suffered a direct injury. Granted, the individual may have suffered a monetary loss in the first two situations, but such an explanation only begs the question of why or how a monetary loss gives rise to anger.

The answer lies in the fact that the car, the house, and the child are more than mere possessions of the individual; they are objects of personal meaning and import. They are objects that the individual has ascribed meaning to, objects the individual has a personal

69. G. HEGEL, *supra* note 41, para. 100 (emphasis in original).
70. *See* text accompanying notes 6-8 *supra*.
71. Wolfgang, *supra* note 11, at 227-29.

investment in, objects that indeed represent an extension of the individual beyond his or her body into the surrounding world. The objects are, in essence, a part of the individual, and to the extent that they are damaged, he too is damaged.

A. Cathexes, Object Relationships, and the Development of Meaning

The process of investing oneself into objects or persons in one's world is known in psychoanalytic terms as cathecting, or developing an object cathexis.[72] An individual cathects himself to, or invests herself in, objects in the external world which have served, or which may serve, to gratify instinctive desires.[73] Through cathecting, an individual is able both to focus attention on objects capable of providing gratification and to delay the urgency of need satisfaction. An example may illustrate these concepts most easily.

The human infant enters the world "human in form, beautifully made, but animal in conduct."[74] The infant possesses certain instinctive drives which, when frustrated, give rise to needs. The most notable drives are those of biological survival, sex, and aggression.[75] Not knowing how to or not being able to satisfy instinctive drives on its own, the infant is totally dependent on its mother for survival. Through interacting with its mother the infant comes to know itself as separate from the external world and that the external world (mother) is capable of satisfying its (the infant's) needs.

As the infant continues to interact with its mother, internal images of her begin to develop. When pangs of hunger rise, the need (hunger) will call forth the internal image of the object capable of satisfying the need (mother). The infant no longer will react with a wild, undifferentiated display of frustration over not having its need immediately met, but will be able to delay its outcry of need (albeit only temporarily) by conjuring the internal image.[76] The image not only provides a means of receiving temporary satisfaction in the absence of the gratifying object itself, but also channels the infant's drives toward a realistic means of satisfaction: finding mother.[77] The infant has *bound* some of the free-floating instinctive energy into a cognitive structure: the representation of mother. This binding of energy into a cognitive representation of

72. *See generally* N. CAMERON, PERSONALITY DEVELOPMENT AND PSYCHOPATHOLOGY (1963); S. FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS (1929).
73. *See generally* authorities cited note 72 *supra*.
74. N. CAMERON, *supra* note 72, at 25.
75. *Id.* at 130-33.
76. *Id.* at 44.
77. *Id.* at 154.

an object capable of need satisfaction constitutes a major use of the process of cathexis:

> The term *cathexis* means *the amount of mental energy involved*. It may be *bound energy*, such as we find in relation to organized fantasies, daydreams, conflicts, object relations, the self and social roles. Or it may be *mobile energy*, ready to discharge immediately, by any means available, such as we assume for the id. The concept of cathexis is useful in describing id functions, in understanding ego adaptations and defenses, in formulating the superego and its precursors, and in discussing object relations. . . .
>
> . . . .
>
> We speak of a powerful drive cathexis in infancy, against which the relatively weak ego defenses and adaptive mechanisms cannot prevail. We can point to the violent but poorly organized, impulsive temper tantrums, a familiar form of general nonadaptive tension discharge. We can point out, within the same frame of reference, that as soon as *ego organization* develops which can partially contain the rush of id forces and channel them, a powerful aggressive cathexis can be discharged in a more integrated and more realistic fashion.[78]

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78. *Id. See also* J. COLEMAN, ABNORMAL PSYCHOLOGY AND MODERN LIFE (3rd ed. 1964):

> INSTINCTS. In Freud's view, man is motivated by inborn instincts. Some instincts, such as hunger, thirst, and sex, are constructive; they are directed toward individual survival and the propagation of the species. These *life* instincts are opposed by the *death* instincts which are more obscure in their functioning. They are postulated as the source of hostile aggression and self-destructive behavior. . . .
>
> ID, EGO, AND SUPEREGO. The instincts are contained in a subsystem of the personality, the *id.*. The id is present at birth and knows nothing of reality or morality. It seeks only to gratify instinctual drives, to enjoy the pleasure that results when tension aroused by body needs is discharged. For this reason it is said to operate according to the *pleasure principle*. The id seeks this gratification of needs by means of the *primary process*: it forms a mental image of the object desired. The primary process is evident in dreams, wishful thinking, and hallucinations. This attempt to satisfy the instinctual demand by producing a mental image is called *wish-fulfillment*.
>
> Since the source of instinct is in some body need, the images supplied by the primary process cannot fill these physiological needs. The body's need for water cannot be satisfied by imagining water. Thus some part of the organism must carry out transactions with the real world. The organism must perceive, solve problems, organize and store knowledge, and initiate acts appropriate for achieving goals in the external world. A second subsystem of the personality, the *ego*, develops to perform these functions. Because the ego's primary role is to deal effectively with reality, the ego is said to obey the *reality principle*. Its reality-oriented operations constitute the *secondary process*.
>
> The *superego* is the last system of the personality to emerge. It develops initially from the learning or introjection of the values of society. As the individual matures, the superego is also influenced by the individual's own critical examination of his values. The superego includes what we call *conscience*, it is concerned with whether a thought or act is good or bad, right or wrong.
>
> In general, then, the personality can be viewed as a composite of

This same process underlies much of human thought and behavior. An adult is generally unable to satisfy needs of aggression directly. He or she has learned that to physically assault others results in sanctions from both the external world (retaliation) and the internal world (guilt cast down from the superego).[79] Through the process of neutralization (the channeling of aggressive drives into socially acceptable methods of expression),[80] however, he or she has, perhaps, found satisfaction of this need through driving his or her car. The car, therefore, as an object capable of need-satisfaction, is highly cathected; a great deal of energy is bound to the individual's internal conception of his or her car, and thus the car gains personal meaning.

Several facets of the object-cathexis relationship are important. First, an individual may cathect to an object and develop an internal representation of it capable of bringing temporary instinct gratification, but the ability of this internal image to bring about gratification is limited. If the desired object fails to provide gratification (*e.g.*, the mother does not feed the child, or the car does not function properly), then the amount of energy cathected or bound to the object will decrease as the individual seeks other avenues of gratification. Second, an individual may cathect to an object associated with the gratifying object as well as to the gratifying object itself. Mementos and memorabilia are examples of this type of "cathexis by association." Third, the objects or individuals to which a person cathects vary over time. As an individual matures, the relationships holding meaning for him or her will change in accordance with varying developmental tasks. Reality to a five-year-old differs tremendously from that of a twenty-year-old, and that of a twenty-year-old differs from that of a sixty-year-old. Fourth, more than one person can cathect to the same object in order to obtain gratification. Movie stars, political leaders, football teams, and the American flag are all objects capable of being cathected by large numbers of people.

B. Object Loss and the Desire for Vengeance

Two events occur when an individual suffers the loss of a cathected object. The first is that the individual is forced to abandon,

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biological aspects, represented by the id; psychological aspects, represented by the ego; and social aspects, represented by the superego. Man's basic nature is irrational and selfish. Only social prohibitions (including his internalization of social rules) restrain his instinctive strivings.

Id. at 639 (emphasis in original).

79. N. CAMERON, *supra* note 72, at 188-95. *See also* note 78 *supra*; note 95 *infra*.

80. N. CAMERON, *supra* note 72, at 224.

or decathect, the internal image of the object. A dramatic example of this is found in the process of mourning:

> Now in what consists the work which mourning performs? I do not think there is anything farfetched in the following representation of it. The testing of reality, having shown that the loved object no longer exists, requires forthwith that all the libido [energy] shall be withdrawn from its attachments to this object. Against this demand a struggle of course arises—it may be universally observed that man never willingly abandons a libido-position, not even when a substitute is already beckoning to him. This struggle can be so intense that a turning away from reality ensues, the object being clung to through the medium of a hallucinatory wish-psychosis. The normal outcome is that deference for reality gains the day. Nevertheless its behest cannot at once be obeyed. The task is now carried through bit by bit, under great expense of time and cathectic energy, while all the time the existence of the lost object is continued in the mind. Each single one of the memories and hopes which bound the libido to the object is brought up and hyper-cathected, and the detachment of the libido from it accomplished.[81]

The second reaction to the loss of a cathected object is an upsurge of instinctive drive toward release. By being forced to restore the balance between external and internal reality, the ego's capacity to bind instinctive drives, and thereby prevent their surging into consciousness, is temporarily weakened.[82] Pain, the effect associated with the loss, is experienced internally and gives rise to, or "triggers," the unconscious instinct of self-preservation (biological survival). This need for self-preservation then presses toward consciousness as a desire to destroy the source of the pain: the external world.[83] The external manifestations of this highly charged state can be seen in restlessness, sleep disturbances, rage, and cognitive repetition of the trauma (loss) in both consciousness and dreams.[84]

Faced with the situation of having to decathect the image of the lost love-object in order to restore balance between internal and external reality while simultaneously controlling a powerful instinctive drive to destroy the source of the pain, the ego struggles to maintain its integrity. Rage directed initially toward the entire world is cathected (bound) as quickly as possible to become object-specific; *i.e.*, the rage focuses on the object perceived to be the true cause of the pain: the offender. If the offender is known to the victim, the victim instinctively searches for the offender, seeking to

81. S. FREUD, MOURNING AND MELANCHOLIA, para. 5 (1917), *reprinted in* A GENERAL SELECTION FROM THE WORK OF SIGMUND FREUD 124, 126 (J. Rickman ed. 1957).

82. O. FENICHEL, THE PSYCHOANALYTIC THEORY OF NEUROSIS 118 (1945).

83. *See generally* S. Freud, INSTINCTS AND THEIR VICISSITUDES (1915), *reprinted in* A GENERAL SECTION OF THE WORK OF SIGMUND FRUED 70-86 (J. Rickman ed. 1957).

84. O. FENICHEL, *supra* note 82, at 120.

actualize the self-preservation impulses by killing the offender, thereby stopping the pain associated with the loss.[85]

In those cases where the offender is unknown, discharge of the impulse occurs through physical activity (storming around aimlessly, pacing, yelling and screaming, etc.) and through binding (cathecting) the impulse to alternative gratifying objects. For example, the victim may create a fantasized image of the offender and then exact vengeance in fantasy.[86]

The desire for vengeance, therefore, can be explained psychoanalytically as a desire to destroy that which has caused pain. The pain stems from the loss of an object into which the individual had invested psychic energy via the process of cathexis.

C. Mitigation of Loss, Forgiveness, and Mercy

Four factors are hypothesized as significantly related to the intensity of the feelings of loss and the subsequent desire for vengeance which follow deprivation of a cathected object.[87] The first of these is the individual's expectation that the loss might occur. If destruction of a love-object is foreseen, the ego will prepare itself for the change in the external world, thereby lessening the impact of incoming stimuli which signal the occurrence of change:

> The ego may be regarded as having been developed for the purpose of avoiding traumatic states. Its sifting and organizing [discharging and binding] of incoming excitation are facilitated by its ability to anticipate in fantasy what might occur, and thus to prepare for the future. Economically, such preparation consists of making ready amounts of counter-cathexis for the purpose of binding the excitations to come. Events that have not been anticipated are experienced more forcefully than those pre-

85. Whether or not the victim would actually kill the offender would depend on several factors. If the ego has an opportunity to regain control of the impulses, then the probability of actually exacting revenge or of physically destroying the cause of the pain decreases. Regaining control would be contingent on: (a) the extent to which the avenger is able to discharge energy throughout the hunt; (b) the extent to which the superego is able to exert pressure on the ego to forsake the impulse to destroy; and (c) the ability of the ego to bind the impulse to other avenues of release such as increasing discharge through vengeful fantasy activity.

86. This is not to say that binding the rage to the offender or a fantasized image of the offender is the only means available to the ego of dealing with such rage; but cathecting to the offender is the most reality-based focus of the individual's rage. Other means of defending against the ego-disintegrative effects of a random discharge of rage exist, such as: entering into a depression to seal off incoming overwhelming stimuli; displacing the anger onto other objects (*e.g.*, on the spouse for leaving the door open, on the police department for not preventing the crime, or on an inanimate object, such as a lock, for failing to have prevented entry); rationalizing the loss through seeing the offender as being in need; and denial of the loss through believing the lost object to be merely misplaced.

87. O. FENICHEL, *supra* note 82, at 117-28.

> pared for. Therefore, an incident is likely to have a traumatic effect in direct relationship to the unexpectedness with which it occurs.[88]

This process of preparing for an expected loss is frequently seen in the families of terminally ill patients.

A second means through which severity of loss can be either decreased or increased relates to the individual's experience with loss. Those who have successfully overcome trauma in the past are less likely to be overwhelmed by a change in reality than are those who lack such experiences.[89] Further, individuals who have failed to deal successfully with loss are more likely to experience overwhelming trauma than either those who have dealt successfully with loss or those who have never experienced loss.[90]

A third factor contributing to one's susceptibility to being overwhelmed is the ego's ability to extend itself to deal with additional stress.[91] Individuals who expend great energy in maintaining the psychic status quo are less able to adjust to a new source of stress than are those who have inner resources available to apply to the new task. People suffering from fatigue or physical or mental illness are more likely to experience high states of stress in response to a traumatic loss because the ego is in a weakened state.[92]

The fourth factor which influences the degree of loss experienced is the meaningfulness which the lost object held for the individual. The longer the individual has possessed an object, and the greater the ability of the object to fulfill the person's needs, the more meaningful the object becomes. The more an individual has cathected to an object, the greater the felt loss and the greater the rage at the loss.

Mercy and forgiveness, the popularly conceived antitheses of vengeance, are easily understood from a psychoanalytic point of view. It will be recalled that following a loss an individual is obliged to perform two tasks: decathect the lost object, and bind or deflect the surging instinctive desire for vengeance in order to prevent an unbridled explosion of undirected rage.[93] As the individual achieves these goals, the desire for vengeance decreases: as the lost object is decathected, the amount of pain elicited by the loss decreases;[94] as the pain of the loss subsides, so does the need to eliminate the source of the loss. Eventually, time heals the wounds of transgression.

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88. *Id.* at 117-18.
89. *Id.* at 119.
90. *Id.*
91. *Id.* at 117.
92. *Id.*
93. *See* text accompanying notes 82-85 *supra*.
94. *See* S. FREUD, *supra* note 81, *passim*.

If an offender were caught for a crime, the effects of which were no longer felt by the victim, the superego, by threatening a flood of guilt, would forbid the victim from inflicting punishment on the offender.[95] The guilt the victim would experience for committing an act of revenge effectively deters him or her from carrying the act through. A victim forgives a wrongdoer, therefore, when inflicting punishment on the offender would cause the victim to receive more punishment in the form of guilt than would the offender in the form of retribution. By forsaking vengeance, the victim not only avoids guilt, but also enhances his or her self-image and fulfills other needs by being perceived as forgiving and merciful.

IV. DISCUSSION

The discussion thus far has presented three views of the nature of retribution. At the individual or psychological level, it has been seen that the desire for personal vengeance arises in response to the loss of an object or relationship of personal meaning for the individual. This desire to seek retribution is viewed psychoanalytically as stemming from the need of the individual to destroy that which has caused pain: the offender.[96] At the historical level, we have seen that retribution initially was a matter of individual right and duty. After centuries of legislative and judicial encroachment, however, retribution gradually was incorporated into the public realm, and the role of the victim was lessened proportionately. The state's usurpation of this duty from the victim has found philosophical justification on the grounds that the victim's individual acts of vengeance tend to be disproportionate to the severity of the injury received and are, therefore, morally wrong. The state, it is argued, is able to rationally assess the punishment merited and, therefore, to act morally while meting out punishment.[97] Finally, at the philsophical level, retribution has been viewed as a process through which a societal balance of some sort can be restored by punishing the intentional offender in accordance with the severity of the criminal act.[98]

95. At an early age a child incorporates the teachings of society by incorporating the beliefs of his or her parents. These internalized beliefs, contained in the superego, exist in opposition to the pleasure-for-pleasure's-sake instinctive impulses of the id. N. CAMERON, *supra* note 72, at 190. That which the id wants, the superego forbids through threatening to annihilate the ego with guilt if it (the ego) yields to the demands of the pleasure-seeking id. The ego's task is constantly to arbitrate the irrational demands of the instinctive id and the likewise irrational demands of the overly strict superego. *Id.* at 190-94. *See also* note 78 *supra*.

96. *See* text accompanying notes 81-86 *supra*.

97. *See* notes 53-54 & accompanying text *supra*.

98. *See* text accomanying notes 39-51 *supra*.

A. The Issues

If the state seeks to justify retributory punishment on the grounds that punishment restores a balance, two general issues must be examined. First, punishment must, in fact, be proved *capable* of restoring this balance. Second, it must be shown that punishment is *necessary* to restore this balance. If state-sanctioned punishment does not restore balance, or if balance can be restored through means other than punishment, then the imposition of punishment by the state is not justified (in the former instance) and not necessary (in the latter instance). The relevance of the psychological and historical perspectives of retribution is found in their ability to provide a conceptual framework for examining both the nature of the balance sought to be restored and the utility or necessity of inflicting punishment in order to restore that balance.

1. Issues of Balance I: The Nature of the Balance

The initial question concerns the type of balance the state seeks to restore in inflicting retributive punishment. Despite arguments that justify punishment as a logically necessary means of enforcing consensual rules to further the common good—for such arguments are those of deterrence[99]—punishment, at base, is inflicted to restore a balance between a pre-existing right and a subsequent wrong. The wrong to be remedied, or balanced out, is the unjust infliction of pain, either physical or mental, on an undeserving party. Through the return of pain in the form of retributive punishment, the wrong is sought to be undone, the debt paid, the ill-gotten gains relinquished, the evil annulled, the need for revenge satisfied, and the societal balance restored.[100]

Prior to the state's usurpation of the right to punish, the victim was able to obtain satisfaction or reestablish psychological balance individually by seeking blood revenge. Punishment of the offender, in the eyes of the victim, was a means of destroying that which brought about pain.[101] When the state first intervened in the relationship, the victim, it is argued, was willing to allow such

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99. Ewing stated:

> The retributive theory of punishment involves two main conceptions: (1) that it is an end in itself that the guilty should suffer pain; (2) that the primary justification of punishment is always to be found in the fact that an offence has been committed which "deserves" the punishment, not in any future advantages to be gained by its infliction, whether for society or for the offender as an individual.

A. EWING, *supra* note 48, at 13.

100. *See* text accompanying notes 39-51 *supra* (discussion of the varying views of the goals of retribution).

101. *See* text accompanying notes 81-86 *supra*.

encroachment because the state enhanced the opportunity of the victim to obtain revenge (*i.e.*, restore balance). By allowing the state to avenge personal wrongs, the victim gained two advantages. First, the victim was able to increase the probability of the offender being brought to justice where the offender was physically or socially more powerful than the victim, or where the offender had escaped to another region of the realm. Second, by allowing the state to exact punishment, the victim was able to circumvent the possibility of a vendetta evolving as the result of private acts of vengeance.[102] The state, on the other hand, profited through seizing the offender's property and through charging the victim for the service. The state's original interests in punishing criminals, therefore, were to provide a means for the victim to obtain satisfaction and to enhance the state's treasury.[103]

The notion of the victim acquiescing to the state's assumption of the role of avenger is of central importance because the implication follows that if the state fails in its duty to inflict punishment, the victim will not receive satisfaction and the balance will not be restored. If the victim fails to receive satisfaction, then he or she will seek it personally in the form of private vengeance or will transfer to the state the rage initially created by the offender. In other words, when the state fails to adequately punish an offender, the victim will seek private vengeance and become angry at the state for failing to uphold its obligation. Mob rule, lynchings, and civil disobedience would result. Ewing has noted:

> State punishment was only able to take the place of private vengeance because it satisfied to a certain extent the desire of a man wronged that the person who had wronged him should suffer. This desire is not a highly laudable one, but it had to be satisfied, at least partially, if private vengeance was to be avoided. And, even nowadays, if the law did not usually do its punishing work adequately, private vengeance and mob violence would be far more common than they are.[104]

From both the historical and psychoanalytic perspectives, therefore, it is clear that the state seeks to restore a balance to the victim by inflicting retributive punishment on an offender. By its very nature, the psychological need for vengeance requires satisfaction. The victim of wrongdoing will obtain satisfaction in one form or another with or without the existence or assistance of a

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102. *See* text accompanying notes 8-10 *supra*.

103. The notion of the state punishing offenders in order to satisfy private and public desires for vengeance is one which Honderich cites as a justification which "[f]or a number of reasons of a cultural nature . . . is rarely made explicit." T. HONDERICH, *supra* note 38, at 17. The closest approximations to this argument are found in J. STEPHEN, *supra* note 49, and H. LOTZE, OUTLINES OF PRACTICAL PHILOSOPHY (1885).

104. A. EWING, *supra* note 48, at 71. *See also* W. MOBERLY, THE ETHICS OF PUNISHMENT 279 (1968).

legal system of retribution. To the extent that the legal system is unable to provide means of satisfaction for victims, they will forsake the law and hold it in contempt while obtaining satisfaction or vengeance through alternative, possibly non-legal, means.[105]

2. *Issues of Balance II: Injury/Punishment Equivalence*

If, as argued above, the state is under a duty to inflict retributory punishment in order to reestablish a victim's state of balance, the issue of whether the state can effectively perform its duty presents itself. At early law the state was clearly able to assure victim satisfaction by providing the opportunity to inflict like-for-like vengeance on the offender under the *lex talionis*.[106] As exotic forms of corporal and capital punishment fell from favor, however, the state's ability to assure victim satisfaction decreased. Tedious questions of equivalence emerged, and legisators and magistrates faced the inordinate task of deciding how to determine the quantum of punishment required to satisfy individual cries for vengeance across the varying categories of criminal conduct. The solution adopted was for the state to assume responsibility for determining appropriate punishment. Consequently, relying on what Hegel termed "ideas universally present to conscious psychological experience,"[107] legislators constructed fixed sentencing schemes.

The state's decision to seize control over the determination of punishment form and severity was justified by perceiving victims as irrational in their demands for retribution.[108] Such a belief is validated in both common experience and psychoanalytic thought. The rage an individual experiences following a loss is *per se* irrational in that it is wholly composed of instinctive desire pressing toward manifestation. While it is rational to expect rage in response to an injury, the rage itself is irrational. Only as time passes following the injury can the ego, the seat of reason, harness or bind the instinct and thereby bring reason to the fore.[109] To al-

105. In this light it may be argued that the consideration now given to retribution stems not from the perceived invalidity of the deterrence and rehabilitation theories of punishment *per se*, but from the fact that society at large is not instinctively satisfied by punishments meted out under the deterrence and rehabilitation models. It can hardly be argued that such models (deterrence and rehabilitation) are *per se* ineffective after only a relatively short trial (50 to 80 years). The current "return to retribution," therefore, may stem from a societal desire to do so rather than from a careful analysis of the wisdom of doing so.

106. *See* text accompanying notes 6-7 *supra*.

107. G. HEGEL, *supra* note 41, at para. 101.

108. *See* notes 53-54 & accompanying text *supra*.

109. *See* text accompanying notes 81-95 *supra*.

low the victim to mandate the form and degree of punishment, therefore, would be irrational, particularly if the victim were allowed to make such a decision immediately after receiving the injury.

Although having the state fix criminal punishments is a logical means of overcoming the irrationality of the victim's desires, the practice nevertheless encounters difficulties at several levels. From a psychological perspective, fixed punishments for varying crimes are dubious. Recall first that a basic philosophical tenet of retributive theory is that the punishment should fit the crime or should be the equivalent of the injury inflicted.[110] Justice can be served, Kant stated, only by punishment which exactly equals the injury; to inflict more or less is unjust.[111] Recall also, however, that the magnitude of the individual's loss reaction depends on a combination of four variables: the degree to which the individual had expected the loss to occur, the individual's experience in dealing with loss, the availability of ego resources to manage the conflict, and the extent to which the individual had cathected (valued) the object.[112] In view of the multitude of factors contributing to the severity of the injury suffered, to impose a standard sentence for all acts of a similar behavioral nature assuredly results in cases of both overpunishment and underpunishment. The victim who suffers the loss of a treasured but monetarily worthless family heirloom probably will not receive much satisfaction in seeing the offender fined fifty dollars for the theft. Conversely, the owner of a five-dollar ball-point pen is likely to view a fifty dollar fine for its theft as somewhat onerous.[113]

If one ignores the historical and psychoanalytic perspectives of retribution and vengeance, then the difficulties in applying the Kantian mandate of a strict equivalence between injury and punishment can be overcome in either of two ways. First, it can be argued that, although Kant wrote of the necessity of a precise equivalence, he offered no insight as to how this equivalence is to be achieved. Consequently, his reference to precision is to a *conceptual* equivalence rather than to a *literal* equivalence. In all cases, Kant's examples of equivalence seem to stem from his own intuition and feeling of equality and do not represent a *per se* equivalence of injury and punishment.[114] The "conceptual equiva-

110. *See* text accompanying notes 55-66 *supra*.
111. I. KANT, *supra* note 39, at 196.
112. *See* text accompanying notes 87-92 *supra*.
113. The owner of the family heirloom is likely to make a retributive complaint ("the thief didn't get what he deserved"), while the owner of the pen may rationalize the punishment in a deterrence mode ("well, at least it'll teach him a lesson").
114. *See* text accompanying note 57 *supra*.

lence" argument, as a means of overcoming the "precise equivalence" issue, is strengthened by noting that not all advocates of retribution require the precision urged by Kant. Hegel, for example, reasoned that equality need exist only implicitly, or in "value," rather than in exact equivalency.[115]

The second argument involves shifting the focus of the balance issue from the offender/victim relationship to the offender/society relationhip. Several advocates of retribution theory (*e.g.*, Morris, Hegel) viewed the criminal act as creating an imbalance between the offender and society at large.[116] In this perspective, one can argue for fixed sentencing on the basis of community sentiments about the degree of punishment "deserved" for various criminal acts.

Neither history nor psychoanalytic theory would reject *in toto* the notion that a criminal act creates an imbalance between more than two individuals. Historically, wrongs committed against a member of a clan were viewed as wrongs against the clan as a whole.[117] Psychoanalytically, because an object can be cathected by more than one person,[118] it is clearly possible for a crime (*i.e.*, the destruction or injury of the object) to have more than one victim. It can be argued, for example, that the assassinations of President Kennedy and Martin Luther King, Jr., created a strong public outcry because both men were highly valued (cathected) by large numbers of people.

Shifting the focus of the retributive balance from the individual victim to society in general does not, however, assure agreement in the appropriateness of specific punishments for varying offenses. Because society is composed of individuals, the same factors that influence an individual's reaction to a loss (*i.e.*, the expectedness of the loss, experience in dealing with loss, availability of ego resources, and the extent of the object cathexis)[119] will operate on the public to create different opinions as to the extent of punishment merited for varying offenses. While some concordance as to punishment distribution will probably exist, variance in opinions will also be found. In this vein, H.L.A. Hart has noted that while a common-sense scale of punishment gravity may exist, it

> no doubt consists of very broad judgements both of the relative moral inequity and harmfulness of different types of offence: it draws rough distinctions like that between parking offences and homicide, or between "mercy killing" and murder for gain, but cannot cope with any precise as-

115. *See* note 64 & accompanying text *supra*.
116. *See* text accompanying notes 46-48 *supra*.
117. *See* text accompanying notes 6-7 *supra*.
118. *See* text accompanying notes 80-81 *supra*.
119. *See* text accompanying notes 87-92 *supra*.

sessment of an individual's wickedness in committing a crime . . . .[120]

At its essence, the general question of whether the "precise equivalent" issue in retribution is resolvable rises or falls on one's willingness to accept imprecision. Imprecision in the balancing of the injury and the punishment is inescapable whether one views the injury as victim-specific or as an injury to the whole of society. If precise satisfaction of either the victim or society is desired in every case, then individuals convicted of the same criminal act will necessarily receive differing punishments, because injuries suffered by different victims in response to the same criminal act will vary. Conversely, if equivalence in punishment is desired, then victims will necessarily be oversatisfied in some cases and undersatisfied in others.

B. Mercy and the Necessity of Punishment

Aside from the equivalency problems of a fixed sentencing scheme which ignores the actual injury sustained by the victim,[121] psychoanalytic theory offers a second obstacle to the effectiveness of retribution and fixed sentencing schemes: mercy. As it will be recalled,[122] after a loss the ego moves quickly to bind internal rage and dissipate it through socially acceptable channels. For example, fantasizing revenge, displacing or shifting anger to alternate objects (spouse, self, walls, etc.), and rationalizing or denying the loss all serve as means to restore psychological balance. The issue which retribution theory must address, therefore, is how much punishment should be inflicted on an offender when the victim has already adjusted to the loss and no longer seeks vengeance. Returning to the example of the stolen, monetarily worthless family heirloom, what degree of punishment is necessary to satisfy the victim if the offender is caught six years after the offense? What if the victim has received insurance payments in the interim? Will such tardy punishment restore a balance, or create a new imbalance?

The issue of mercy and forgiveness is one which legal philosophers have consistently failed to address. Kant dismissed the issue in a single paragraph by defining the pardon (the legal analogue of mercy) as the exclusive right of the sovereign, one which "ought not be exercised in application to the crimes of the subjects against each other."[123] Morris cautioned against granting pardons, because they threaten "the maintenance of an equilib-

120. Hart, *supra* note 32, at 25.

121. *See* notes 111-13 & accompanying text *supra*.

122. *See* notes 81-86 & accompanying text *supra*.

123. I. KANT, *supra* note 39, at 204.

rium of benefits and burdens."[124] Morris reasoned that granting pardons will reduce the incentive for the law-abiding to conform, and they too will subsequently engage in crime. Gardner, in a single footnote, posits simply that "[m]ercy, compassion, forgiveness, and their legal analogue, pardon, are matters of grace, not of entitlement. Hence, they are necessarily *ad hoc* and discretionary and cannot appropriately be defined through rules."[125]

The cited arguments against a rule-defined system of forgiveness are flawed. Kant implicitly assumed that an injury, once created, lasts forever. Morris clearly argued from a deterrence viewpoint, stressing the future effects of granting pardons. Gardner, by asserting that mercy is not a matter of entitlement, violated the principal tenet of retribution: the punishment must be the equivalent of the injury. If one is willing to assess the extent of an injury in order to fix punishment, one should also be willing to assess the possible *non-existence* of an injury in order to negate the need for punishment. Retribution, under a system incorporating principles of both vengeance and mercy, would afford the offender the opportunity to be forgiven for his or her crime where it could be shown that an injury no longer exists.

It may be argued that the varying statutes of limitations show legislative intent to incorporate rule-defined elements of forgiveness and mercy into the law. Their purpose has been defined as "prescribing limitations to the right of action on certain described causes of action . . . . In criminal cases, however, a statute of limitation is an act of grace, a surrendering by the sovereign of its right to prosecute."[126]

While possessing intuitive appeal as manifestations of mercy, statutes of limitations cannot withstand close scrutiny as being accurately grounded in retributive theory. The victim's desire for vengeance (be it a single victim or the whole of society) decreases gradually with time, not in the all-or-none fashion implicit in current forms of statutes of limitations. Under a system of retributive

124. Morris, *supra* note 42, at 573.

125. Gardner, *Book Review*, 59 NEB. L. REV. 44, 52 n.32 (1980) (A. VON HIRSCH & K. HANRAHAN, THE QUESTION OF PAROLE (1979)).

126. BLACK'S LAW DICTIONARY 1077 (rev. 4th ed. 1968). An interesting question arises as to the role of the statute of limitations in deterrent and rehabilitative theories of punishment. If mercy is granted an offender via the statute in the belief that to punish an individual at such a remote time would not serve notions of retributive justice, could such a rationale stand under theories which look to the goals of setting examples and providing treatment? Could not the argument be made that in the name of deterrence the offender should be punished whenever apprehended? And in the name of rehabilitation could one not justify treating the offender for far-removed crimes so long as the offender still appears to need treatment?

justice concerned with the integration of vengeance and mercy and the proper asssessment of the current extent of the injury, sliding statutes of limitations would exist to reflect the gradual decline in the desire for revenge.

V. CONCLUSION

This article has examined vengeance, retribution, and mercy from the historical, philosophical, and psychoanalytic points of view. If general conclusions are to be drawn, it might be concluded that, in Hart's terms, the retributive theory of punishment has a valid General Aim in allowing individuals who have suffered the loss of an object of personal meaning to satisfy their instinctive desire for vengeance. This valid General Aim, however, will not justify punishment in those instances where victims of crime have adjusted to loss or have forgiven their offenders.

The traditional theory of retribution also waivers in answering Questions of Distribution. Particularly troublesome is the problem of achieving an equivalence between the injury received and the punishment returned. This difficulty stems from the inability of the state to provide like-for-like forms of retribution, and from the fact that an injury, once received, diminishes in severity (heals itself) with time through covert psychological processes.

With respect to current arguments seeking to establish fixed sentencing schemes on the basis of retribution theory, both the historical and psychoanalytic concepts of retribution cast serious doubt on the proposal's appropriateness and logical underpinnings. To affix a constant penalty to a specific behavior (*e.g.*, burglary, auto theft, assault, etc.) without regard to the actual injury inflicted by the act, violates the basic principle of retribution: equating the punishment with the injury. Standard sentences are unsupportable in a retributive framework because: (1) the response of victims to a crime (in terms of the injury suffered) is inconsistent among victims, due to a variety of psychological factors influencing the individual's initial response to the loss, and (2) the passage of time following an injury decreases a victim's desire for vengeance as psychological processes mitigate and eventually dissipate the effects of the loss. To impose set sentences inequitably distributes punishment because cases of both overpunishment and underpunishment will result.

While the conclusions drawn from the integration of the historical, philosophical, and psychoanalytic views of retribution are conceptually sound, empirical investigations of the relationships existing between crime, the extent and duration of victim reactions, and the long-term societal perceptions of injury are needed to assess the asserted conclusions. Among others, specific empiri-

cal questions would include whether victims actually differ in their subjective desires for retribution, both initially and across time, whether society in general feels offenders should be punished less severely as the interval between the criminal act and the time for punishment increases, and whether a correspondence exists between the time required to pass by statutes of limitations before the state grants mercy and the time both victims and society feel should pass before forgiving the offender.